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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971

No. 71-1422

MURRAY KAPLAN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT

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TOPICAL INDEX

TABLE OF AUTHORITIES

Constitution

Rules

Texts

Miscellaneous

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OPINIONS BELOW

The opinion of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles is reported in 23 Cal.App.3d Supp. 9, 100 Cal. Rptr. 372, and is printed in Appendix "A" to the Petition for Certiorari. Petitioner has included in his Petition for Certiorari, at Appendix "B", the original opinion of

said Appellate Department rendered on October 27, 1971, which was superseded and replaced by the above opinion published in 23 Cal.App.3d Supp. 9; said original opinion is, of course, unreported.

JURISDICTION

The judgment of the Appellate Department of the Superior Court of the State of California for the County of Los Angeles (23 Cal.App.3d Supp. 9) was entered on February 7, 1972.

The first opinion of said Appellate Department was rendered on October 27, 1971, and an order correcting it was made on November 3, 1971. On November 10, 1971, said Appellate Department ordered a rehearing (Appendix "D", Petition for Certiorari) on Petitioner's motion.

After rehearing, the Appellate Department, on February 7, 1972, rendered its opinion affirming the judgment of conviction, at the same time certifying the cause to the California Court of Appeal pursuant to Rule 63(a) and (3) of the California Rules

of Court. The Court of Appeal denied said certification on February 17, 1972.

The effect of said denial was that the Appellate Department of the Superior Court of the State of California became the highest State court to which an appeal could be taken. (California Penal Code §1471; California Rules of Court, Rules 62, 24(a) and 28(b)).

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the law of obscenity has changed, or should be changed, to the extent that the states should be denied the power to regulate admittedly obscene matter unless it is sold to a minor or thrust on an unwilling public.

2. Whether the law of obscenity has changed, or should be changed, to the extent that nothing may be considered to be obscene, or to exceed contemporary standards, or

to appeal to prurient interest, or to be utterly without redeeming social importance, unless it is first sold to a juvenile or thrust on an unwilling public.

3. Whether the book sold by Petitioner is obscene.

4. Whether California Penal Code §311 and §311.2, as construed and applied, deprive Petitioner of his liberty and property without due process of law and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, inasmuch as they allow the prosecution to prove that Petitioner commercially exploited the book for the sake of its prurient appeal to the exclusion of all other values, to prove that the book was utterly without redeeming social value; and whether such evidence is sufficient, as a matter of law, to outweigh evidence, no matter how slight, that the book has some social value.

5. Whether California Penal Code §§ 311 and 311.2, as construed and applied, deprive Petitioner of his liberty and property without due process of law and the equal protection of the laws and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments:

(a) Where the prosecution was allowed, without announcing it would do so in the accusatory pleading, to prove that the book sold by Petitioner was utterly without redeeming social importance by proving that Petitioner commercially exploited the book for the sake of its prurient appeal, to the exclusion of all other values, and where a state statute codifying such method of proof became effective prior to Petitioner's trial, albeit after he sold the book; and

(b) Where the California Supreme

Court had ruled that a seller's statement that matter was obscene was insufficient to establish the elements that it went beyond contemporary community standards and appealed to prurient interest.

6. Whether California Penal Code §§ 311 and 311.2, as construed and applied, deprive Petitioner of his liberty and property without due process of law and abridge his exercise of freedoms of speech and press, contrary to the provisions of the First and Fourteenth Amendments, because the standard for judging the alleged obscenity of the book Petitioner sold was based upon the community standards of the State of California and not the standards of the Nation as a whole.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

3. The pertinent provisions of Article I, Section 10, of the United States Constitution are:

> "No State shall . . . pass any . . . ex post facto laws, . . ."

4. California Penal Code §311, at the time of the commission of the alleged offense, provided as follows:

"As used in this chapter:

(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) 'Matter' means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statute or other figure, or any recording, transcription or mechanical, chemical or

electrical reproduction or any other articles, equipment, machines or materials.

(c) 'Person' means any individual, partnership, firm, association, corporation, or other legal entity.

(d) 'Distribute' means to transfer possession of, whether with or without consideration.

(e) 'Knowingly' means having knowledge that the matter is obscene. (Added Stats. 1961, c.2147, p. 4427, §5)."

5. The pertinent provisions of California Penal Code §311.2, at the time of the commission of the alleged offense, provided as follows:

"(a) Every person who knowingly: sends or causes to be sent, or brings or causes to be

brought into this state for sale or distribution, or in this state prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor."

6. California Penal Code §311(a)(2), which became effective after the commission of the alleged offense, but prior to Petitioner's trial, provides as follows:

"In prosecutions under this chapter, where circumstances of production, presentation, sale, dissemination, distribution, or publicity indicate that matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the

matter and can justify the conclusion that the matter is utterly without redeeming social importance."

STATEMENT

On May 14, 1969, Sergeant Shaidell of the Los Angeles Police Department went to the Peek-A-Boo Bookstore in the City of Los Angeles to investigate citizen complaints that obscene matter was being sold there (A. 38, 43-44). He had been a vice investigator for approximately eight years, six of them exclusively devoted to pornography investigations (A. 37).

Before entering the store, Shaidell ascertained that Petitioner was the owner (A. 45) although he did not know that the person working in the store when he entered was Petitioner (A. 49). Upon entering, Shaidell observed that only sex-oriented merchandise was displayed (artificial sex devices such as dildos, paperback books, magazines and motion picture films); news and general interest type magazines were not for sale (A. 38).

Shaidell perused several of the books and magazines, whereupon Petitioner advised Shaidell that the Peek-A-Boo was not a library (A. 39). The two then conversed, Shaidell asking if Petitioner had any "good sexy books" (A. 54). Petitioner replied, "All of our books are sexy. Look at this [opening a magazine]. You can see right inside her cunt. Some of these only have the female alone and some of them have ones with the - with a guy and a gal, and they're screwing around (A.54)." After more such conversation, Shaidell asked Petitioner if he had any "real good" paperback books. Petitioner said, "Hey, I'm reading one right now, and its called Suite 69." (A. 55) Petitioner then read a passage to Shaidell, as follows:

> "'Suck it, darling, oh, fuck my pussy with your tongue, sweetie,' Gloria grunted, beginning to squirm her naked buttocks on the sheet as Maria's fiery tongue inside her fervid cunt almost drove the young Negress into hysterics." (A. 57)

Shaidell and Petitioner then proceeded to the cash register, Petitioner explained to

Shaidell the degree of explicitness and prices of his films, and the purchase of the book Suite 69 and a magazine was consummated (A. 55).

On May 15, 1969, Sergeant Piazza purchased a sex-oriented motion picture from Petitioner. Thereafter the book and magazine purchased by Shaidell, and the film purchased by Piazza were submitted to the City Attorney for the City of Los Angeles, who filed a three-count complaint, on June 3, 1969 (A. 7), alleging violations of Penal Code §311.2.

Petitioner's trial commenced in the Los Angeles Municipal Court on January 12, 1971. Sergeants Shaidell and Piazza testified as stated above. Hubert Blackwell then testified on behalf of the prosecution. Blackwell had been a police office for the City of Los Angeles for nearly eight years, and a vice investigator for 16 months. Based on his elicited experience, his formal and practical training and education, and his research, the court allowed Blackwell to testify as an expert on the question of prurient appeal and contemporary standards (A. 121-125) of the book Suite 69 (A. 126).

Part of Blackwell's research consisted of a survey taken by him and two other officers of the Los Angeles Police Department, wherein 20 cities and 19 counties were polled to determine, as objectively as possible, what were the contemporary community standards for the State of California (A. 87-89, 92-98). Blackwell's testimony established that the book Suite 69 met the test for obscenity, i.e., prurient appeal and contemporary community standards (A. 128, 131). The prosecution then rested, having presented no direct evidence that Suite 69 was utterly without redeeming social importance. The jurors, in addition to hearing the book read to them, also inspected the book, and their attention was directed to the advertisements in the back of the book (A. 82).

The only witness called by Petitioner was Frank Laven, an attorney in Los Angeles who specializes in defending persons charged with violating obscenity laws (A. 258, 305-307). He opined that the book Suite 69 does not go beyond customary limits of candor in the State of California (A. 293) and does not appeal to a prurient

interest (A. 302). He also testified that in his opinion all of the charged matter had social importance in that some people could learn about sex from them or be entertained by them (A. 304).

On the question of customary limits of candor and community standards, Laven felt that, pictorially, with the exception of some sex acts without text or description and sometimes excretion, nothing would go beyond contemporary standards (A. 308). Editorially, nothing would exceed contemporary community standards (A. 309). In Laven's opinion, there was probably nothing that would appeal to the prurient interest of the average person (A. 310, 314), and he had never seen any matter which in his opinion would appeal to the prurient interest of the average person (A. 311-314). According to Laven, bestiality graphically depicted would neither appeal to the prurient interest of the average person in the State of California, nor would it go beyond contemporary community standards (A. 315). The same is true of sadism (A. 316), incest (A. 317), and sodomy (A. 319).

Petitioner also introduced into evidence, and had read to the jury, a book entitled Adam and Eve (A. 340), which had been held to be constitutionally protected by the Supreme Court. Said book was presented as "comparable" matter for the jury to consider in deciding the obscenity of Suite 69 (A. 340).

Prior to the trial, Petitioner moved to dismiss the complaint on the basis that sale of matter to an adult, whether obscene or not, is protected by virtue of Stanley v. Georgia, 394 U.S. 557. In connection with said motion, the prosecution stated that the case involved sales to adult police officers (A. 14). Respondent would dispute Petitioner's contention that the record supports his many statements in his brief, that any stipulation was entered into, or that Petitioner never sold to minors or thrust his wares on an unwilling public. Petitioner also moved to dismiss Count 3, involving the sale of Suite 69, on the grounds that it was constitutionally protected as a matter of law. Both motions were denied.

Following deliberation, the jury acquitted Petitioner as to the sale of the film and the magazine, but found him guilty as to the sale of Suite 69.

Petitioner prosecuted an appeal to the Appellate Department of the Superior Court of the State of California for the County of Los Angeles, presenting, inter alia, the following contentions:

(1) Suite 69 is not obscene;

(2) The prosecution should have been required to prove, by direct evidence, as an element of the crime, that Suite 69 is utterly without redeeming social importance;

(3) Community standards of the nation, rather than the state, should have been applied; and,

(4) The prosecution should have been required to prove that Suite 69 appealed to the prurient interest of its actual or intended audience, or went substantially beyond contemporary limits of candor measured by community standards in the nation as a whole.

On October 27, 1971, the Appellate Department of the Superior Court of the State of California for the County of Los Angeles filed a memorandum opinion and judgment affirming the conviction (Appendix B, Petition for Certiorari). In answering Petitioner's second contention regarding testimony as to social value, the court relied on A Book v. Attorney General (1966) 383 U.S. 413, and also pointed out that that case was the basis for recent California legislation (California Penal Code §311(a)(2)).

Petitioner then filed a Petition for Rehearing and/or Certification to the California Court of Appeal, pointing out that Penal Code §311(a)(2) did not become effective until November 10, 1969, while the complaint alleged that the violation occurred on May 14, 1969 (Petitioner's trial commenced on January 12, 1971).

The Petition for Rehearing was granted on November 10, 1971. On February 7, 1972, the Appellate Department filed its second opinion and judgment, again affirming the conviction; at the same time it certified the cause to the California Court of Appeal

pursuant to Rule 63(a) and (3) of the California Rules of Court. In so doing, the Appellate Department certified the following questions:

(1) Is the proper community standard in an obscenity prosecution for sale of a book that of the State of California or a national standard?;

(2) Is it proper to place the burden of going forward with evidence as to the redeeming social value of matter which meets the tests of appeal to prurient interest and exceeding customary standards on the defendant?;

(3) If the answer to the previous question is in the affirmative, what is the burden of the People in meeting defendant's evidence of redeeming social value?;

(4) In California may evidence of the circumstances of production, presentation, sale, dissemination, distribution or publicly constitute sufficient evidence of lack of

redeeming social value either under the case of A Book v. Attorney General (Memoirs) (1966) 383 U.S. 413, 420, 16 L.Ed.2d 1, 6, 86 S. Ct. 975 or under Penal Code §311(a)(2)?; and,

(5) May Penal Code §311(a)(2) be applied in a prosecution for sale or distribution of obscene matter where the sale or distribution occurred before the effective date of such provision?

On February 17, 1972, the Court of Appeal of the State of California, Second Appellate District, Division Three, made its order denying transfer of the cause without comment.

SUMMARY OF ARGUMENT

1. Petitioner was convicted of violating a valid statute which was properly applied. He sold an admittedly obscene book to a police officer who did not state why he wanted to buy it. The officer went to the store because of complaints from the

public, and the record is otherwise barren of any evidence (including any prosecution stipulation) that Petitioner neither thrust his wares on an unwilling public nor sold them to minors. Stanley v. Georgia, 394 U.S. 557, expressly held that the dissemination of obscene matter was still beyond constitutional protection. Adoption of Petitioner's contention would require that the court overrule practically every prior obscenity decision. Any system allowing "appropriately controlled" bookstores raises even more grave constitutional questions than now exist; it is eminently unworkable and has been so proven.

2. The record in the case strongly supports the jury's finding that Suite 69 is "patently offensive".

Petitioner's contentions regarding public opinion of the regulation of obscenity are neither supported by his cited authority nor the record. If this Court were to adopt his theory it would mean that regulation of pornography would be abandoned to its purveyors, a system which even the record in this case shows cannot be accomplished. If public attitudes towards

pornography were as Petitioner describes, there would be no convictions. While it is true that public attitudes have changed since the Roth decision, this Court has consistently held that dissemination of hard-core pornography is beyond the protection of the constitution. A system such as proposed by Petitioner, wherein matter is not classified as obscene until after the effect it has had on the public is weighed, is unworkable and raises grave constitutional questions. The great majority of Americans are still opposed to the dissemination of pornography, and merely because it has some value to some individuals does not mean that it has redeeming social importance.

A mere promise or statement of intent by purveyor of pornography, that he will not sell to minors, is not a "reasonable protection against exposure to juveniles". People in Petitioner's position have also demonstrated that they cannot and will not prevent such matter from being thrust on an unwilling public.

3. Suite 69 is obscene, measured by any realistic standard, including those set

forth in the past by this Court. The question of its obscenity has now been reviewed and unanimously affirmed by two municipal court judges, three judges of the Superior Court Appellate Department, and a jury of twelve of Petitioner's peers. In so doing, they compared Suite 69 to a book (Adam and Eve) which Petitioner claimed and stipulated was most comparable to Suite 69, which book was held not obscene by this Court. The jury implicitly found that Suite 69 was not comparable, and was, in fact, obscene. Petitioner has shown nothing to indicate otherwise.

4. The term "utterly without redeeming social importance" practically defies definition, and should be rewarded or defined so as to provide a workable standard. The Court should declare that it should be considered an affirmative defense, and the defense should be required to prove it at least sufficient to raise a reasonable doubt. The California courts place only the most minimal burden on a defendant, that he merely identify in what area he feels the matter has social value. To do otherwise would require the prosecution to prove a negative out of a void, while all

the time a defendant, who would maintain the matter is a protected form of expression, need not identify in what area of human endeavor it lies. In this case, a proper and valid standard of evidence, as expounded in A Book v. Attorney General, 383 U.S. 413, was applied to support the jury's finding that Suite 69 was utterly without redeeming social importance. The test stated in A Book is a good test in that it protects all legitimate and sincere attempts at creativity, no matter how poorly executed.

5. Petitioner was not convicted of "pandering". His statements were such that they legally amounted to admissions, and could be used against him in following the test set forth by this Court in A Book v. Attorney General, enacted into law prior to Petitioner's trial, merely stated a rule of evidence which had existed in the entire nation since 1966. It created no new crime such as "pandering", and the state of the law has remained the same from long before Petitioner committed the violation until the present.

6. Use of a statewide, rather than nationwide, standard of contemporary community standards was proper. California

standards would favor a defendant in a pornography case. California now requires expert testimony, based on objective methodology, to prove what are the standards; to require proof of national standards would result either in impossibility of proof or relaxation of such a strict burden, to Petitioner's detriment.

I

CALIFORNIA PENAL CODE §§ 311 and 311.2, AS CONSTRUED AND APPLIED TO AUTHORIZE THE JUDGMENT OF CONVICTION OF PETITIONER HEREIN, FOR SELLING AN ADMITTEDLY OBSCENE BOOK TO AN ADULT, DOES NOT DEPRIVE PETITIONER OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW AND DOES NOT ABRIDGE PETITIONER'S EXERCISE OF FREEDOMS OF SPEECH AND PRESS

Petitioner contends, while admitting that the book Suite 69 is obscene, that the court should overrule Roth v. United States, 354 U.S. 476, and hold that the sale of admitted hard-core pornography to a "consenting adult" should be protected under the free speech and press and due process provisions of the First and

Fourteenth Amendments to the United States Constitution.

The basis of Petitioner's argument is founded in Stanley v. Georgia, 394 U.S. 557, and has been answered by this Court not only in Stanley (at 394 U.S. 567), but in United States v. Reidel, 402 U.S. 351, and United States v. Thirty-Seven (37) Photographs, 402 U.S. 363.

Perhaps Petitioner seeks to change the court's collective mind, or sway individual opinions, by asserting that a different set of facts exists, by asserting that the respondent "stipulated" that Petitioner "neither sold the material in his bookstore to minors nor thrust it upon the general public". Such allegation is totally unsupported by the record. Petitioner has referred to the Appendix, page 14, in support of this alleged "stipulation". The record clearly shows that the prosecutor, in an in-chambers discussion of Petitoner's pretrial motion to dismiss, stated that his case involved sales to a police officer. Neither the record nor respondent has information as to whether or not Petitioner sold also to minors, or thrust his

merchandise on an unwilling public, other than citizen complaints (A. 38, 41-44).

The substantial factual difference between this case and those in United States v. Thirty-Seven Photographs is that here there is an even greater danger of the very risks Petitioner conceded, that the matter may come within the possession of children or be thrust on an unwilling public.

The right of any citizen to be free from Government thought control may be absolute, but it does not protect others who stimulate his thoughts with conduct. As the court stated in United States v. Thirty-Seven Photographs, 402 U.S. 363, 376, rejecting the same argument, "Whatever the scope of the right to receive obscenity adumbrated in Stanley, that right, as we said in Reidel [United States v. Reidel, 402 U.S. 351], does not extend to one who is seeking, as was Luros here, to distribute obscene materials to the public ...."

Petitioner misses the point of Reidel and Thirty-Seven Photographs in saying that the single incident of a sale to a police

officer comes within the purview of Stanley. The purchase by the police officer is nothing more than an investigatory method designed to demonstrate conditions which this Court has again and again stated may be regulated. No one knows but what Petitioner's next customer was a child, or if he sometimes peddles his pornography door-to-door.

California Penal Code §§ 311 and 311.2 are not so broad that they unreasonably restrict a person's rights to think and read what he pleases, and they in no way invade any recognized rights of privacy.

II

OBSCENE MATTER IS NO LESS OBSCENE MERELY BECAUSE IT IS SOLD TO AN ADULT INSTEAD OF A CHILD, OR FORCED ON AN UNWILLING ADULT, AND STATE REGULATION IS PROPER AND NECESSARY

Merely because a state may bar distribution to children of books deemed suitable for adults (Ginsberg v. New York, 390 U.S. 629) does not mean, as Petitioner contends, that the state may not reasonably restrict

the sale of obscene matter by virtue of the fact that the sales are not to children.

This Court has made clear, in its decisions since Stanley v. Georgia, that there was no "new chapter" in the sage of obscenity. Under our Constitution no case can ever be the final chapter, but the clear public interest in and desire for a decent society mandate that a chapter be written which will recognize pornography for the pollution that it is.

While arguing that Roth v. United States, 354 U.S. 476, is still good law containing a good test of obscenity, Petitioner also argues that Roth must now die of some sort of attrition because contemporary community standards have changed to the extent that absolutely any kind of matter is acceptable to the American public.

In making such a fantastic claim for the degeneration of American morals, Petitioner relies on oversimplifying the findings and results of a poll taken by the Commission on Obscenity and Pornography, published in The Report of the Commission on Obscenity and Pornography, United States

Government Printing Office, September 1970. He draws a debatable conclusion from said poll while ignoring other evidence in the Report to the contrary, as well as other existing polls and evidence. For instance, a poll of community standards taken in California indicated that 99% of that community felt that film depiction of simulated sex acts went beyond community standards and appealed to a prurient interest (A. 134).

He fails to acknowledge many other public opinion surveys on the question of obscenity, such as the Gallup and Harris polls, which contradict the Commission poll (Report of the Effects Panel, Section B, "Public Opinion About Sexual Materials").

Petitioner looks to the Commission's conclusions about its poll to support his conclusions about public opinion, yet the Commission's poll is inconclusive and does not say what Petitioner says it says.

While "almost 60%"(actually 59%) believed that adults should be allowed to read or see any explicit materials they want to, this indicates nothing more than

a concurrence with the philosophy of Stanley v. Georgia. It is not an indication of public opinion as to customary limits of candor according to contemporary community standards. Nearly half of the "almost 60%" favored Governmental regulation of dissemination of pornography because of a concern for children and young people. Only 52% had no objection ("it would be 'all right'") to make such material available to adults on some private basis. Only 53% felt it was "all right" for adults to have access to textual material which merely contains a description of male and female sex organs, and only 29% felt it was "all right" to admit adults to movies which might or might not be hard-core pornography. The statistics of the Commission hardly indicate an "anything goes" consensus of American public opinion, nor are they any indication of contemporary community standards. In fact, according to research done for the Commission by its poll-takers, by far the most prevalent reaction to sexual materials was that of disgust; reaction to sexual materials would seem a more accurate indicator of contemporary community

standards regarding such matter (Abelson, et al., Technical Reports of the Commission on Obscenity and Pornography, Volume 6).

Respondent submits that Petitioner's theory based on the empirical evidence gathered by the Commission, is incorrect.

Petitioner also seems to feel that the trend of judicial thought in this country is to a theory that the obscenity of a particular item must be judged according to the prurient appeal it would have for its intended recipient. In so arguing, he indulges in some misrepresentation. When Justice Harlan spoke of explicit sexual material as "memorabilia of a man's thoughts and dreams", he did so in an opinion flatly rejecting petitioner's argument (United States v. Reidel, 402 U.S. 351). The court in United States v. Dellapia, 433 F.2d 1252, goes on to say, in the paragraph following the one quoted by Petitioner:

> "It may be that one who would claim first amendment protection of his privacy could, as under the fourth amendment, 'break the seal

of sanctity and waive his right to privacy.' Lewis v. United States, 385 U.S. 206, 213, 87 S.Ct. 424, 428, 17 L.Ed. 2d 312 (1966) (Brennan, J., concurring), by for example engaging in a commercial enterprise. Public display of obscenity even to consenting adults, or private possession with an intent to distribute publicly, present cases which are not before us. Booksellers will not as a result of our decision today be free to maintain 'emporium[s] for smut'."

Karalexis v. Byrne, 306 F. Supp. 1363, in addition to the fact that it was vacated by this Court (Byrne v. Karalexis, 401 U.S. 216), somewhat preceeded United States v. Reidel, 402 U.S. 351, and United States v. Thirty-Seven Photographs, 402 U.S. 363. This Court did not even see fit to discuss the "consenting adult" theory, perhaps because it did so a few months later. Moreover, Karalexis v. Byrne was a divided opinion.

United States v. Thirty-Seven Photographs, etc., 156 F. Supp. 350 (D.C. N.Y. 1957), was an opinion of a single trial judge in a truly unique factual situation, and, since it is fifteen years old, can hardly be said to represent a trend.

Contrary to Petitioner's contention, the California decisions most definitely not been moving towards Petitioner's theory. It was rejected by the California Supreme Court in People v. Luros, 4 Cal.3d 84, 90. The court called the argument "ingeniously concatenated" and stated such an analysis of Stanley v. Georgia to be incorrect and without merit. In re Giannini, 69 Cal.2d 563, merely stands for the proposition that a topless dance is a theatrical performance that must be prosecuted on an obscenity theory even though the charged violation is lewd conduct or indecent exposure. The trend in California is seemingly slightly reversed at the present time (see Bowling, et al. v. California, petition for writ of certiorari pending, United States Supreme Court, October term, 1971, No. 71-1572).

If one turns to Glancy v. County of Sacramento as cited, in the official California Appellate Reports, one will find only a blank page. The only supposition that can reasonably be made from the granting of a hearing by the California Supreme Court, over a year ago, is that it apparently disagrees with the theory.

Petitioner's theory - that the seller of hard-core pornography ought to be protected by the First and Fourteenth Amendments to the Constutiton, when matter is sold from an "appropriately controlled" bookstore to a "consenting adult", with "reasonable protections" against exposure to juveniles and being thrust on an unwilling public - is unrealistic, unworkable, and fraught with its own constitutional dangers.

Any Governmental attempt to control Petitioner's activities through a licensing system, such as exists with alcoholic beverages, would raise serious questions about prior restraints.

Petitioner's concept of an "appropriately controlled" bookstore with "reasonable

safeguards" is simply his hollow and platitudinous way of saying he should be left free and unfettered in his pursuit of the peddling of pornography, and he will "promise" not to sell to persons he knows to be juveniles, or mail his material to persons who have not requested it. If either of these things should unfortunately occur, Petitioner would presumably apologize gracefully.

Petitioner's plan would not work. The Report of the President's Commission shows that under present laws juveniles still come into possession of pornography. Legalizing distribution to adults would certainly cause an increase in juvenile possession through redistribution. Respondent does not say that Petitioner should then be prosecuted, but only that allowing free and easy distribution to adults would of necessity result in less protection from exposure to juveniles.

It is also a fallacy to say that Petitioner would not "thrust pornography on an unwilling public". The police investigated Petitioner because they had received complaints from citizens (A. 38, 43-44).

There were approximately 250 "adult bookstores" in the City of Los Angeles in September 1970 (A. 58); by legalizing them a public display (probably due to increased competition) would be certain to occur, as it did in Denmark. The public, willing or not, would have to add it to the list of the other pollutants with which it is forced to live. If an unwilling citizen now receives unsolicited pornography in the mail, he must take affirmative action to prevent a future occurrence.

The average citizen wonders why this is so; he wonders why it is so that sexually explicit matter, displayed in a manner calculated to appeal to prurient interest, is presently sold from newspaper vending machines up and down the sidewalks of his city; he wonders if this is what the Constitution means by freedom of speech.

Respondent questions Petitioner's sincerity in claiming he should be trusted not to sell to minors and not to intrude on the public. His brief is not exactly a paragon of forthrightness; he has indulged in flights of fancy with a practically nonexistent "stipulation"; he has cited cases

for propositions opposite their holdings; he has cited cases where more recent controlling cases refuting his proposition go uncited; he has cited reversed and vacated cases, by omission of a word or a paragraph in a quoted opinion he has made misleading statements of holdings. These things may well be accidental, but Petitioner is playing with a loaded gun; carelessness by him in self-regulation would be just as bad as deliberateness.

III

THE BOOK SUITE 69 IS OBSCENE AND IS NOT PROTECTED BY THE FREE SPEECH AND PRESS AND DUE PROCESS PROVISIONS OF THE FIRST AND FOURTEENTH AMENDMENTS

Whether or not Suite 69 is obscene is something this Court must determine by independent review. Respondent respectfully submits that an independent review will result in a finding of obscenity. Suite 69 is a compilation of sexual adventures and perversions luridly dealt with in a shocking, morbid and shameful manner. It

consists of some 180 pages of unrelated erotic scenes. There is no theme, plot or character development, only graphically depicted and emphatically described sex acts, which include repeated acts of masturbation, oral copulation, voyeurism, lesbianism, homosexuality, sadism and sodomy. Sex omitted, the book would consist of 180 blank pages.

The essence of Petitioner's argument is that no book can ever be obscene, and the only authority for the argument is a list of other books held not obscene by this Court. Petitioner presented one of said books (Adam and Eve, Hoyt v. Minnesota, 399 U.S. 524) to the jury, and the jury was instructed to compare said book with Suite 69. The jury was instructed that said book was not obscene, and that such fact must be considered by them in determining obscenity (A. 445-446).

Two other counts involved a pictorial magazine and a motion picture, and other "comparables" were introduced by Petitioner for the same purpose. After considering Petitioner's comparable exhibits and comparing them with the charged film,magazine

and Suite 69, the jury acquitted Petitioner as to the film and magazine. No jury could have had the benefit of more information and analysis. While this Court's power to review is an independent one, how far can one in good conscience go; how lightly can the jury's verdict be regarded, in keeping faith with the jury system? (See dissent of Warren, C.J., Jacobellis v. Ohio, 378 U.S. 184, at 202-203.)

IV

CALIFORNIA PENAL CODE §§ 311 AND 311.2, CONSTRUED AND APPLIED TO ALLOW THE PROSECUTION TO PROVE THAT MATTER IS UTTERLY WITHOUT REDEEMING SOCIAL IMPORTANCE BY PROVING THAT IT WAS COMMERCIALLY EXPLOITED FOR THE SAKE OF ITS PRURIENT APPEAL, TO THE EXCLUSION OF ALL OTHER VALUES, DOES NOT DEPRIVE PETITIONER OF HIS LIABILITY AND PROPERTY WITHOUT DUE PROCESS OF LAW, AND DOES NOT ABRIDGE HIS FREEDOM OF SPEECH AND PRESS

The first hurdle for Petitioner is to show thst the test of "utterly without redeeming social importance" is an element

of obscenity which must be proven by the prosecution to establish a prima facie case. Social importance was not clearly articulated as a test for obscenity until A Book v. Attorney General, 383 U.S. 413; three justices used the words: "three elements must coalesce: 'It must be established . . . (c) the material must be utterly without redeeming social value.'" (383 U.S. at 418, emphasis added.)

Since only three justices concurred in this statement, no authoritative precedent was established (United States v. Pink, Superintendent, etc., 315 U.S. 203). The statement is generally accepted in some form and with some effect because of its underlying philosophy. But does a majority of the court feel it is elemental, or definitional, as in Roth v. United States, 354 U.S. 476 and Manual Enterprises v. Day, 370 U.S. 478?

Respondent believes that the test should be considered an affirmative defense, requiring proof by a Petitioner sufficient to raise a reasonable doubt that the matter contains something of social value sufficient to redeem it. The Appellate

Department of the Superior Court of the State of California for the County of Los Angeles has decided that a defendant has the burden only of going forward with some evidence of social value, upon which the prosecution is required to prove the matter is utterly without redeeming social importance. The court said: "The reason for this rule is that when prurient interest is predominant and the customary limits of candor are exceeded it is difficult to conceive wherein social value might be. Rather than require the People to start in this void the defendant must make the start by producing some evidence of social value. Only then do the People know in what area they have to proceed" (People v. Holden, Appellate Department, Superior Court of Los Angeles County, State of California, No. CR A 10754, unrep. 1972). In 1970, the same court stated that the prosecution should not be required to "start in a void and prove a negative" (People v. Newton, 9 Cal.App.3d Supp. 24). It also noted that the California Supreme Court apparently agreed, in In re Giannini (1968) 69 Cal.2d 563, (9 Cal.App.3d Supp. at 28).

The second question is whether Petitioner's evidence contained any proof of redeeming social importance. Petitioner called a defense attorney, specializing in defending obscenity cases, who opined that the film, magazine, and Suite 69 all had social importance in that, to some people they in some instances "educate persons as to sex"; also, some persons might be entertained (A. 304).

This testimony, Petitioner claims, establishes that all of the material had redeeming social importance. Nothing could more clearly and patently violate what this Court has intended in its statements regarding social value. California juries have the right to disregard expert opinion if they find it to be unreasonable (California Penal Code §1127[b]), and the jurors in this case were amply justified in rejecting it.

The jury's determination that Suite 69 is utterly without redeeming social importance also finds support in this Court's own statement in A Book v. Attorney General, 383 U.S. 413, 420, wherein it was said that a book which is patently offensive, which

has the requisite prurient appeal, and which contains a minimum of social value, may still be utterly without redeeming social importance where the evidence shows it was commercially exploited for the sake of its prurient appeal. This is exactly what Petitioner did, and he should not be heard to complain because his evaluation was accepted by the jury.

V

PETITIONER WAS NOT CONVICTED OF "PANDERING", NO STATE STATUTE WAS RETROACTIVELY APPLIED TO INVOKE SUCH A CONCEPT, AND NO SUCH CONCEPT WAS "INVOKED" BY THE COURT BELOW. THE COURT BELOW DID NOT NEGLECT OR REFUSE TO FOLLOW BINDING PRECEDENT

The opinion of the Appellate Department makes clear that Petitioner was not convicted of "pandering". Neither was a "concept" of pandering "devised". Rather, the court below carefully followed the law as set forth by the United States Supreme Court in A Book v. Attorney General, 383 U.S. 413, 420, in determining the

sufficiency of the evidence. The court did not say that Petitioner's discussion of Suite 69 constituted pandering, it merely held that the jury was justified in accepting Petitioner's statements at face value on the issue of social value.

Childs v. Oregon, 401 U.S. 1006, is not applicable here, mainly because it is per curiam citing Redrup v. New York, 386 U.S. 767, but also because the evidence is not "virtually identical". In Childs, the Petitioner merely referred the officer to a group of books containing the "worst ones"; here, Petitioner recommended a specific book and read aloud to the officer from it. Under such circumstances, the law of A Book v. Attorney General was properly applied to support the jury's finding that Suite 69 was utterly without redeeming social importance.

In People v. Noroff, 67 Cal.2d 791, and People v. Rosakos, 268 Cal.App.2d 497, it was held that the matter, upon independent review, did not meet the Roth test for obscenity, and that the missing element of prurient interest could not be supplied by pandering. The Appellate Department in

this case properly held Noroff and Rosakos not applicable, in that the question presented here went to the manner of proof rather than the lack of it.

Since the California legislation codifying the rule of A Book v. Attorney General became effective November 10, 1969, and Petitioner was charged with violating the statute some six months earlier, he claims he is the victim of an ex post facto law. Section 311(a)(2) does not create a new crime, but merely codifies a rule of evidence followed since A Book v. Attorney General came down. Petitioner's argument is without merit since no contrary California law was changed by the enactment of §311(a)(2).

Further, §311(a)(2) is merely a rule of evidence which became effective fourteen months before Petitioner's trial and thus was not ex post facto (Thompson v. Missouri, 171 U.S. 380; Beazell v. Ohio, 269 U.S. 167, 171; and Donald v. Jones, 445 F.2d 601, 604-605).

VI

CALIFORNIA PENAL CODE §§ 311 AND 311.2, AS CONSTRUED AND APPLIED, TO ALLOW THE OBSCENITY OF A BOOK TO BE JUDGED ACCORDING TO STATE-WIDE CONTEMPORARY COMMUNITY STANDARDS, DO NOT DEPRIVE PETITIONER OF HIS LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW, AND DO NOT ABRIDGE PETITIONER'S EXERCISE OF FREEDOM'S OF SPEECH AND PRESS UNDER THE FIRST AND FOURTEENTH AMENDMENTS

Jacobellis v. Ohio, 378 U.S. 184, supplied no guidance for state courts on the issue of a national versus state standard, inasmuch as two justices felt a national standard should apply, two favored a state standard, four expressed no opinion, and one seemingly leaned toward a state standard. Today only one justice expressing an opinion remains on the court. Petitioner would solve the problem by blind adherence to narrow rules rather than approach the question from a standpoint of developing a test which would afford protection to First Amendment rights and still be rational.

For instance, a rule could develop that national standards should apply, but the jury could determine what that standard

is on the basis of their own information. Such a rule would afford little protection to Petitioner.

Respondent views the question as one of quantity versus quality. Thus, the California Supreme Court held, in In re Giannini, 69 Cal.2d 563, that a statewide standard was appropriate, but that it must be established by expert testimony. This has resulted in the contemporary community standards of the State of California being objectively determined by the taking of a scientifically conducted statewide opinion poll approximately every six months. Thus, the quality of the evidence on this point is high.

Imposition of a requirement that a national standard be proved would make such survey virtually impossible. Furthermore, it is more than likely that such hypothetical national standard, if it could be determined, would tend to be more stringent and restrictive than California's standards.

Thus, while a national standard might be better for Petitioner because it would be more difficult to prove, the quality of

evidence needed to prove such would of necessity suffer. A national standard might be determined by reference to mass media, which undoubtedly is a strong factor in both determining and reflecting contemporary community standards. Television, major studio motion pictures, mass circulation magazines and bestselling books could be held to reflect national standards. In this situation, anything more explicit than the Playboy centerfold or The Sensuous Woman would run the risk of being held obscene.

Clearly, the California method of proof, involving such exacting quality, must be held sufficient under the Constitution.

CONCLUSION

For the foregoing reasons, the judgment herein should be affirmed.

Respectfully submitted,

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